

(iii) Amounts subject to withholding under section 1446; and

(iv) Amounts not listed in paragraphs (f)(3)(i) through (iii) of this section.

(4) *Coordination with section 1445(e)(1).* Except as otherwise provided in this section, a publicly traded partnership that complies with the requirements of withholding under section 1446 and this section will be deemed to have satisfied the requirements of section 1445(e)(1) and the regulations thereunder. Notwithstanding the excluded amounts set forth in paragraph (f)(3) of this section, distributions subject to withholding at the applicable percentage shall include the following—

(i) Amounts subject to withholding under section 1445(e)(1) upon distribution pursuant to an election under § 1.1445-5(c)(3) of the regulations; and

(ii) Amounts not subject to withholding under section 1445 because the distributee is a partnership or is a foreign corporation that has made an election under section 897(i).

[T.D. 9200, 70 FR 28717, May 18, 2005]

§ 1.1446-5 Tiered partnership structures.

(a) *In general.* The rules of this section shall apply in cases where a partnership (lower-tier partnership) that has effectively connected taxable income (ECTI), has a partner that is a partnership (upper-tier partnership). Except as provided in paragraph (e) of this section, if an upper-tier domestic partnership directly owns an interest in a lower-tier partnership, the lower-tier partnership is not required to pay the section 1446 withholding tax (1446 tax) with respect to the upper-tier partnership's allocable share of net income, regardless of whether the upper-tier domestic partnership's partners are foreign. Paragraph (b) of this section prescribes the reporting requirements for upper-tier and lower-tier partnerships subject to section 1446. Paragraph (c) of this section prescribes rules requiring a lower-tier partnership to look through an upper-tier foreign partnership to a partner of such upper-tier partnership to the extent it has sufficient documentation to determine the status of such partner and determine such partner's indirect share of the lower-tier partnership's effectively

connected taxable income (ECTI). Paragraph (d) of this section prescribes rules applicable to a publicly traded partnership in a tiered partnership structure. Paragraph (e) of this section prescribes rules permitting a domestic upper-tier partnership to elect to apply the look through rules of paragraph (c) of this section. Paragraph (f) of this section sets forth examples illustrating the rules of this section.

(b) *Reporting requirements—(1) In general.* Notwithstanding paragraph (c) of this section, to the extent that an upper-tier partnership that is a foreign partnership is a partner in a lower-tier partnership, and the lower-tier partnership has paid 1446 tax (including installment payments of such tax) with respect to ECTI allocable to the upper-tier partnership, the lower-tier partnership shall comply with §§ 1.1446-1 through 1.1446-3 and provide the upper-tier partnership notice of such payments and a copy of the statements and forms filed with respect to the upper-tier partnership's interest in the lower-tier partnership (e.g., Form 8805, "Foreign Partner's Information Statement of Section 1446 Withholding Tax"). The upper-tier partnership may treat the 1446 tax (or any installment of such tax) paid by the lower-tier partnership on its behalf as a credit against its liability to pay 1446 tax (or any installment of such tax), as if the upper-tier partnership actually paid over the amounts at the time that the amounts were paid by the lower-tier partnership. See § 1.1462-1(b) and § 1.1446-3(d). To the extent required in § 1.1446-3(d)(1)(iii), the upper-tier partnership will file Form 8804, "Annual Return for Partnership Withholding Tax (Section 1446)," and Form 8805, "Foreign Partner's Information Statement of Section 1446 Withholding Tax," for each of its foreign partners with respect to its 1446 tax obligation. To the extent the upper-tier partnership does not claim a refund of the 1446 tax it paid (or is considered to have paid), the upper-tier partnership will pass the credit for the 1446 tax paid to its partners on the Forms 8805 it issues. See § 1.1446-3(d). The rules of this paragraph (b) shall apply to an upper-tier and lower-tier

partnership to the extent that an election has been made and consented to under paragraph (e) of this section.

(2) *Publicly traded partnerships.* In the case of an upper-tier foreign partnership that is a publicly traded partnership, the rules of § 1.1446-4(c) shall apply. See also paragraph (d) of this section.

(c) *Look through rules for foreign upper-tier partnerships.* For purposes of computing the 1446 tax obligation of a lower-tier partnership, if an upper-tier foreign partnership owns an interest in the lower-tier partnership, the upper-tier partnership's allocable share of ECTI from the lower-tier partnership shall be treated as allocable to a partner of the upper-tier partnership, to the extent of such partner's indirect share of such ECTI (as if such partner were a direct partner in the lower-tier partnership), if—

(1) The upper-tier foreign partnership furnishes the lower-tier partnership a valid Form W-8IMY, "Certificate of Foreign Intermediary, Flow Through Entity, or Certain U.S. Branches for United States Tax Withholding," indicating that it is a look-through foreign partnership for purposes of section 1446; and

(2) The lower-tier partnership can reliably associate (within the meaning of § 1.1441-1(b)(2)(vii)) effectively connected partnership items allocable to the upper-tier partnership (and indirectly to such partner) with a Form W-8 (e.g., Form W-8BEN), Form W-9, "Request for Taxpayer Identification Number and Certification," or other form acceptable under § 1.1446-1, establishing the status of such partner provided by the upper-tier partnership. The lower-tier partnership required to pay 1446 tax must be able to provide the information necessary for the IRS to determine the chain of ownership, allocation of effectively connected items at each partnership level, as well as to the ultimate beneficial owner of the effectively connected items, and whether the amount of 1446 tax paid was appropriate. This information should permit each partnership in the tiered structure and the IRS to reliably associate any effectively connected items allocable to such upper-tier partnership, as well as to the ultimate ben-

eficial owner of the effectively connected items. The principles of § 1.1441-1(b)(2)(vii) shall apply to determine whether a lower-tier partnership can reliably associate effectively connected partnership items allocable to the upper-tier partnership with a partner of the upper-tier partnership. To the extent the lower-tier partnership receives a valid Form W-8IMY from the upper-tier partnership but cannot reliably associate a portion of the upper-tier partnership's allocable share of effectively connected partnership items with a partner of such upper-tier partnership, then the lower-tier partnership shall pay 1446 tax on such portion at the higher of the applicable percentages in section 1446(b). See § 1.1446-3(a)(2) for the treatment of any income or gain potentially subject to a preferential rate. If a lower-tier partnership has not received a valid Form W-8IMY from the upper-tier partnership, the lower-tier partnership shall withhold on the upper-tier partnership's entire allocable share of ECTI at the higher of the applicable percentages in section 1446(b). The look through regime set forth in this paragraph (c) is for purposes of computing the lower-tier partnership's 1446 tax obligation only and does not alter the persons considered to be partners in the lower-tier partnership for partnership reporting purposes (e.g., issuing Form 8805, Schedule K-1).

(d) *Publicly traded partnerships—(1) Upper-tier publicly traded partnership.* The rules set forth in paragraph (c) shall not apply to look through an upper-tier partnership whose interests are publicly traded (as defined in § 1.1446-4(b)(1)).

(2) *Lower-tier publicly traded partnership.* The look through rules of paragraph (c) of this section shall apply, if the requirements of that paragraph are met, to a lower-tier partnership that is a publicly traded partnership within the meaning of § 1.1446-4(b)(1) only if the upper-tier partnership is not described in paragraph (d)(1) of this section. For example, a lower-tier publicly traded partnership (or nominee) shall look through an upper-tier foreign partnership (or domestic partnership to the extent an election is made and consented to under paragraph (e) of this

section) when computing its 1446 tax liability, provided the upper-tier partnership is not a publicly traded partnership and the appropriate documentation needed to satisfy the standards set forth in § 1.1441-1(b)(2)(vii) and paragraph (c) of this section have been furnished.

(e) *Election by a domestic upper-tier partnership to apply look through rules—*

(1) *In general.* Subject to the rules of this paragraph (e), a domestic partnership that is a partner in a lower-tier partnership may elect to apply the rules of this section 1.1446-5 and have the lower-tier partnership look through such upper-tier partnership to the partners of such domestic partnership for purposes of computing the lower-tier partnership's 1446 tax liability. A domestic partnership shall make this election by attaching to the Form W-9 submitted to the lower-tier partnership, a written statement and information (described in paragraph (e)(2) of this section) that identifies the upper-tier partnership as a domestic partnership and that states that such partnership is making the election under this paragraph (e). This paragraph (e)(1) shall not apply to a publicly traded partnership described in § 1.1446-4(b)(1). See paragraph (d)(1) of this section.

(2) *Information required for valid election statement.* In addition to the requirements of paragraphs (e)(1) and (3) of this section, the election statement submitted under this paragraph (e)(2) is not valid and cannot be accepted by the lower-tier partnership pursuant to paragraph (e)(3) of this section unless the upper-tier partnership attaches valid documentation pursuant to § 1.1446-1 (e.g., Form W-8BEN) with respect to one or more of its foreign partners. The information and documentation submitted with the election must comply with the rules of this section to permit the lower-tier partnership to reliably associate (within the meaning of § 1.1441-1(b)(2)(vii)) at least a portion of the upper-tier partnership's allocable share of ECTI with one or more foreign partners of the upper-tier partnership. The election statement must identify the upper-tier partnership by name, address, and TIN, and specify the percentage interest the domestic partnership holds in the lower-tier partnership. The

statement may also include such information the upper-tier partnership deems necessary to enable the lower-tier partnership to apply the provisions of this section. If at any time the upper-tier partnership determines that the information or documentation previously provided to the lower-tier partnership is no longer correct, the upper-tier partnership shall update such information and documentation. Except as provided in paragraph (e)(3) of this section, an election that is effective under this paragraph (e) shall apply for subsequent taxable years until such upper-tier partnership revokes the election in writing. A revocation under this section shall be effective for any installment due date arising more than 15 days subsequent to the date that the lower-tier partnership receives such revocation.

(3) *Consent of lower-tier partnership.* An election made under this paragraph (e) is not effective until the lower-tier partnership consents in writing to the upper-tier partnership that it agrees to apply the provisions of this section. A lower-tier partnership may not consent to an election submitted under this paragraph (e) for any installment date or Form 8804 filing date arising within 15 days of the lower-tier partnership's receipt of such election. The lower-tier partnership's written consent must specify the extent to which it will look through the upper-tier partnership in computing its 1446 tax (or any installment of such tax). To the extent that the lower-tier partnership does not consent to an election to apply the look through provisions of paragraph (c) of this section, the lower-tier partnership shall consider such portion of the upper-tier partnership's allocable share of ECTI as allocable to a domestic person for purposes of computing its 1446 tax obligation. A lower-tier partnership that has consented to an election under this paragraph (e) may revoke or modify its consent, in writing, at any time.

(f) *Examples.* The following examples illustrate the provisions of this section. In considering the examples, disregard the potential application of § 1.1446-3(b)(2)(v)(F) (relating to the *de minimis* exception to paying 1446 tax). The examples are as follows:

Example 1. Sufficient documentation—tiered partnership structure. (i) Nonresident alien (NRA) and foreign corporation (FC) are partners in PRS, a foreign partnership, and share profits and losses in PRS 70 and 30 percent, respectively. All of PRS's partnership items are allocated based upon each partner's respective ownership interest and it is assumed that these allocations are respected under section 704(b) and the regulations thereunder. NRA and FC each furnish PRS with a valid Form W-8BEN establishing themselves as a foreign individual and foreign corporation, respectively. PRS holds a 40 percent interest in the profits, losses and capital of LTP, a lower-tier partnership. NRA holds the remaining 60 percent interest in profits, losses and capital of LTP. All of LTP's partnership items are allocated based upon each partner's respective ownership interest and it is assumed that these allocations are respected under section 704(b) and the regulations thereunder. LTP has \$100 of annualized ECTI for the relevant installment period. All of this income is ordinary income and there is no potential application of a preferential rate applicable percentage under § 1.1446-3(a)(2). Further, § 1.1446-6 does not apply. PRS has no income other than the income allocated from LTP. PRS provides LTP with a valid Form W-8IMY indicating that it is a foreign partnership and attaches the valid Form W-8BENs executed by NRA and FC, as well as a statement describing the allocation of PRS's effectively connected items among its partners. The information that PRS submits to LTP is sufficient to permit LTP to reliably associate (within the meaning of § 1.1441-1(b)(2)(vii)) PRS's allocable share of effectively connected items with NRA and FC pursuant to this section. Further, NRA provides a valid Form W-8BEN to LTP.

(ii) LTP must pay 1446 tax on the \$60 allocable to its direct partner NRA using the applicable percentage for non-corporate partners (the highest rate in section 1).

(iii) With respect to the effectively connected partnership items that LTP can reliably associate with NRA through PRS (70 percent of PRS's 40 percent allocable share (\$40), or \$28), LTP will pay 1446 tax on NRA's allocable share of LTP's ECTI (as determined by looking through PRS) using the applicable percentage for non-corporate partners (the highest rate in section 1).

(iv) With respect to the effectively connected partnership items that LTP can reliably associate with FC through PRS (30 percent of PRS's 40 percent allocable share (\$40), or \$12), LTP will pay 1446 tax on FC's allocable share of LTP's ECTI (as determined by looking through PRS) using the applicable percentage for corporate partners (the highest rate in section 1).

(v) LTP's payment of the 1446 tax is treated as a distribution to NRA and PRS, its direct partners, that those partners may credit

against their respective tax obligations. PRS will report its 1446 tax obligation with respect to its direct foreign partners, NRA and FC, on the Form 8804 and Forms 8805 that it files with the Internal Revenue Service pursuant to paragraph (b) of this section and will credit the amount withheld by LTP on its Form 8804. This credit will satisfy PRS's 1446 tax liability as reported on the Form 8804 it files because PRS's only income is from LTP, and LTP paid 1446 tax with respect to all of PRS's allocable share in LTP by looking through to PRS's partners NRA and FC. Further, PRS will pass along the credit for the 1446 tax withheld by LTP to its partners, NRA and FC on the Form 8805 issued to each partner. The credit passed to each partner on Form 8805 will be treated as a distribution to the respective partners under section 1446(d).

Example 2. Insufficient documentation—tiered partnership structure. (i) LTP is a domestic partnership that has two equal partners A and PRS. A is a nonresident alien and PRS is a foreign partnership that has two equal foreign partners, C and D. Neither A nor PRS provides LTP with a valid Form W-8 or Form W-9. Neither C nor D provides PRS with a valid Form W-8 or Form W-9. Pursuant to § 1.1446-1(c)(3), LTP must presume that PRS is a foreign person subject to withholding under section 1446 at the higher of the highest rate under section 1 or section 11(b)(1). LTP has also not received any documentation with respect to A. LTP must presume that A is a foreign person, and, if LTP knows that A is an individual, compute and pay 1446 tax, subject to § 1.1446-3(a)(2), based on that knowledge.

(ii) Assume a change of facts where C provides a form W-8 (e.g., Form W-8BEN) to PRS, and PRS in turn, furnishes that form to LTP along with its Form W-8IMY, and information regarding how effectively connected items are allocated to C and D. Based upon the additional facts, LTP can reliably associate one-half of PRS's allocable share of ECTI with documentation related with C. Therefore, under paragraph (c)(2) of this section, LTP will look through PRS to C when computing its 1446 tax to the extent of C's indirect share and will not look through with respect to the remainder of PRS's allocable share (D's indirect share).

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